be affirmed, but for different reasons. The opinion of Mr. Justice Sloss, (Shaw, J., and Angellotti, J., concurring) holds that there was no miscarriage of justice under the constitutional amendment. Before the adoption of the amendment the higher courts had no power to weigh the evidence, so that where there was a substantial error of law, prejudice had to be presumed. The presumption was abolished by the amendment, and prejudice must now appear from an examination of the evidence. The error complained of was the violation of a constitutional right, but the opinion holds that even this does not necessarily require a reversal. It would seem that a denial of those rights which a defendant can not waive, such as trial by jury in felony cases, would always be reversible error, even in the clearest case of guilt. On the other hand, the defense of former acquittal is waived by not pleading it, yet the refusal to permit the plea by the trial court would certainly require a reversal. Each case will have to be determined on its own facts.

The opinion of Mr. Justice Lorigan, (Melvin, J., and Henshaw, J., concurring) places the affirmance on the ground that the defendant waived the error by voluntarily giving at the trial the same testimony elicited by the grand jury. In this view the constitutional amendment is not involved. The scope of the amendment, especially in regard to constitutional rights, is therefore still open.

A. M. K.

Evidence: Books of Account.—When an action is brought for goods sold and delivered, under what conditions are the books of account admissible in evidence to prove the sale, delivery and price? There is a loose notion prevalent that all that is necessary in such cases is to offer the books without any preliminary proof. It is not surprising that such a notion should prevail among business men who naturally place implicit reliance on their books, but it is very strange that lawyers have to be told again and again that the books themselves are hearsay, and the facts therein contained must be proved by some one having personal knowledge, by some one, for example, who made or saw the delivery.[1]

The prevalence of the erroneous notion among lawyers may perhaps be accounted for by the shop book exception to the hearsay rule in the United States. But that exception only applied when a shopkeeper was a party to the action. Being disqualified as a witness under the old law, his books became admissible subject to sundry limitations and exceptions, more or less strictly enforced—that the party had no clerk, kept true accounts, other people had acted on them, reputation for correctness,—the exception not applying to cash items, large amounts to show to whom credit was given, or to occupations other than shopkeeping.[2] The necessity for this exception has disappeared with the

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[1] Chandler v. Robinett (Feb. 27, 1913) 16 Cal. App. Dec. 415.

[2] Landis v. Turner, (1860) 14 Cal. 573.

abolition of the party disqualification as a witness. A party may now take the stand and testify to the facts; he may also use his books to refresh his memory, or, where he retains no recollection, may testify from his books under section 2047 of the California Code of Civil Procedure.

It is eminently desirable that the law should not appear ridiculous in the eyes of business men by shutting out evidence upon which every business man relies in transactions of the greatest magnitude; yet to permit the introduction of the books without testimony under oath from anyone knowing the facts would seem to hold out a reward for fraudulent bookkeeping. The law has gone some distance in an effort to reconcile business methods with a due regard to security against dishonest practices.

1. The books are recognized as entitled to greater credit than ordinary hearsay, for they come in after a witness has testified to the facts as secondary or supplementary evidence.[3]

2. Where the witness once knew the facts but has forgotten them, the books can be used under section 2047 of the Code of Civil Procedure.

3. Where either the person making the entry or the person having knowledge of the fact is dead, there is a well recognized exception to the hearsay rule for entries or declarations of a deceased person in the regular course of business.[4]

There is, however, one case of real hardship where the books are made up from the reports of numerous persons, clerks, salesmen, conductors, teamsters, etc. After the expiration of a short time, the difficulty of finding and producing these persons makes it impossible to prove the case if the rule is enforced. Where thousands of lives depend on the accuracy of a railroad time sheet, it certainly seems pedantic to say that that time sheet is not evidence unless verified by the various despatchers, conductors, and other officials, who may be scattered over several states. There is ample authority to support the view that practical inconvenience in such cases is equivalent to the death of the declarant.[5] This practical inconvenience should of course be first proved by the party offering the evidence. This was not done in the California cases,[6] and the decisions are therefore justified; but the language of the court in these cases would exclude the

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[3] Cowdery v. McChesney, (1899), 124 Cal. 363, 57 Pac. 221.

[4] No code section covers this case, and in Iowa, under similar code provisions, this exception to the hearsay rule is not allowed; Cummins v. Pennsylvania Fire Ins. Co. (1912), 153 Ia. 579, 134 N. W. 79. It seems, however, to be recognized in California in accordance with common law principles. San Francisco Teaming Co. v. Gray, (1909), 11 Cal. App. 314, 104 Pac. 999.

[5] Chesapeake & O. Ry. Co. v. Stojanowski, (1911) 191 Fed. 720; Wigmore on Evidence, section 1530.

[6] People v. Mitchell, (1892), 94 Cal. 550, 29 Pac. 1106; San Francisco Teaming Co. v. Gray, supra.

books even when the proof was conclusive of the impossibility of obtaining the employees. It is submitted that in such exclusion the court goes too far.

A. M. K.

Evidence: Question Calling for Legal Conclusion of Witness.—In Winslow v. Glendale Light and Power Company,[1] the point at issue was whether one was an independent contractor or an agent of the defendant. A workman was asked, "for whom were you working" on such and such a day. The Court of Appeals on two hearings[2] held the question admissible. In reversing the holding, the Supreme Court said, although only by way of dictum, that when the fact of agency is an incidental matter, such a question is permissible, even commendable, for the purpose of curtailing the inquiry, but that where that fact is the issue the question is inadmissible as calling for a conclusion of law.

The question, "for whom a man works," involves a peculiar ambiguity.[3] Like the question, "Is A agent?" or "Is B possessed?" it may either be understood in a lay sense or be construed as asking for a technical legal relation. If given but the bare question, it is almost impossible to apply the opinion rule intelligently, for the reason that the circumstances of the case and the qualifications of the witness must be considered.[4] The complexity or simplicity of the situation may be

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[1](Feb. 13, 1913) 45 Cal. Dec. 201; 130 Pac. 427.

[2] (1910), 12 Cal. App. 530, 107 Pac. 1012; (June, 1912), 14 Cal. App. Dec. 855.

[3] Wigmore on Evidence, section 1960; Bunting v. Salz (1889), 22 Pac. (Cal.) 1132, ("Did X exercise any acts of ownership or control over property?"—allowed); Kaltschmidt v. Weber (1904), 145 Cal. 596, 79 Pac. 272 ("Who had control of earnings?" allowed); Nathan v. Dierssen, (1905), 146 Cal. 63, 79 Pac. 739, ("Who was in possession of ranch X in '80?" allowed. Held that "possession" meant "occupancy" and not "legal seisin," and so not bad as asking for legal conclusion); Major v. Connor, (1912), 162 Cal. 131, 121 Pac. 371 ("Under whose control did you do the work?" Agency was issue but allowed); Service v. Deming Investment Company, (1899), 20 Wash. 668, 56 Pac. 837, ("Do you know whom he represented then?" i. e. in doing business. Allowed); McCormick v. Queen of Sheba Gold Mining Co., (1900), 23 Utah 71, 63 Pac. 820, ("Were you Manager of X Co?" excluded); Arndt v. Boyd, (1898), Tex. Civ. App.; 48 S. W. 771 ("Who managed business on A's place?" Answer, "A's wife ran business and seemed to be boss," excluded).

[4] Thayer, Preliminary Treatise on Evidence at the Common Law, 525. Prof. Thayer says that the difficulty over the opinion rule, "results from differences of practical judgment in applying an admitted rule, the difference arising from differing judgments as to what is and is not really to be called opinion evidence in the sense of the rule." The rule should exclude, "What, in the judgment of the court, will not be helpful to the jury." Such a principle allows "a very great range of permissible difference in judgment; and . . . conclusions of that character ought not, usually, to be regarded as subject to review